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ABSTRACT

In the United States, copyright owners retain exclusive rights to their creative works. They alone have the legal right to reproduce, distribute, publicly perform, or publicly display their works or to construct derivative works. The recently enacted Digital Millennium Copyright Act has created several complex questions related to distance education for which higher education institutions must quickly search for procedural answers. This Digest poses and answers four questions that challenge basic knowledge of current copyright law and typify current concerns in institutions of higher education. Questions include whether or not movies may legally be shown as part of distance education course offerings, who holds intellectual property rights to a distance education course constructed by faculty, what intellectual property right individuals should pursue when creating distance education materials, and whether faculty may legally distribute to distance education students electronic copies of materials that would normally be placed on reserve for them in the school's library. (PW)

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Copyright Concerns in the Age of Distance Education

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In the United States, copyright owners retain exclusive rights to their creative works. They alone have the legal right to reproduce, distribute, publicly perform, or publicly display their works or to construct derivative works. The recently enacted Digital Millennium Copyright Act (DMCA) has created several complex questions related to distance education for which higher education institutions must quickly search for procedural answers. The questions framed below challenge basic knowledge of current copyright law and typify today's concerns in institutions of higher education; copyright owners referred to in these questions and answers are either an organization or individuals in an institution.

A professor in our program usually shows movies as part of her instruction. This semester, we have transferred the course to a distance education offering. Will the movies the instructor plays be part of the classroom exemption of the copyright law?

Do not play the movies! Performance and display exceptions to the copyright law, Section 110(1), are far from the same in Section 110 (2), which points out that transmissions, displays or performances of copyrighted materials are "more restrictive than in the classroom exemption" (Gasaway, 1999). Institutions are to work within certain guidelines when using copyrighted works in distance education. These institutional guidelines are:

1) the works must be part of the systemic instructional activities of a nonprofit education institution (or government body);
2) the works must be directly related and of material assistance to the teaching content; and
3) transmission must be made primarily for reception in the classroom or other place normally devoted to instruction.

Copyright restrictions include a place or reception requirement; Gasaway (1999b) points out that in distance education, instruction is not classroom to classroom, but takes place in homes, dorm rooms and other places. Such classroom to non-classroom delivery places institutions at great risk when attempting to use copyrighted materials in instruction without permission. Diotalevi (2000) concurs with this analysis by stating that reading a text to a class in a distance education setting is allowed under the DMCA, "but showing the movie of the same name is quite another matter. When passed in 1976, Section 110(2) {of the original Copyright Act} involved only television technology." Generally, distance education should not use performances of any work. The instructor should perform the material, e.g., role- playing, and should not rely upon educational tools, such as movies, musical performances and videos, to illustrate a point.

I am a new Associate Professor and wonder if I have any right to my intellectual property. I have collaborated with two other professors on a distance education course. Who holds the intellectual property rights to the course and its materials?

Distance education may create the opportunity for faculty and other members of the campus community to work together on producing courses. While such a team effort may be required for the successful outcome of the course, the contributors should clarify their intellectual property rights before working in such teams. The DMCA does allow such "joint owners (to) individually exploit the work" (Salomon, 1995). Burk (1997) points out that with "works made for hire, the statute provides that the employer of the individual who creates the work is considered the author." However, policy makers should keep the following in mind:

1) Copyright ownership policies should be written to allow the faculty member to reproduce his or her own work without requesting permission from the institution.
2) Any work-for-hire tenets should not be strongly enforced or implied, to the extent that the institutions would have the authority to determine, suggest, or decide where the work was published and how usage licenses of the material would be coordinated and managed.
3) In distance education, it is in the best interest of the institution and of the collaborating members to define each participating member's ownership rights. All faculty and staff collaborating on distance education projects should know who owns the final product, collaboratively or individually.

Where software creation is involved, Weiss (1996) states that the actual software program used to deliver distance education may be both patentable and copyrightable. The faculty members and collaborators should not attempt to determine their intellectual property rights alone. Campus counsel should assist in clarifying the policies to faculty and staff. Whenever applicable, *joint* intellectual property rights should be given to the individuals involved.

I am an Associate Dean. The Vice President of Academic Affairs and our Dean are on a campus committee to attempt to redesign our intellectual property policies on campus. Many faculty believe the new online courseware they are developing for distance education should fall under the patent section of our intellectual property policy, whereas we thought these materials would be of copyright interest. What intellectual property right should individuals pursue when creating distance education materials or tools?

Online courses, syllabi and course materials used in distance education should be considered parallel to materials created for face-to-face instruction and, therefore, should be integrated into part of the copyright policy on campuses. Alpern (1999) delineates the types of intellectual property prevalent today in the United States. These are:

1) Patents, which entail three types (utility, design and plant), each of which carries individual design and creation issues. Generally,

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under federal patent law, the patents must be created by the holder, physically manufactured or invented or discovered.
2) Trademarks are a "distinctive word, phrase, symbol or other recognizable device that identifies a product or service."
3) Trade secrets are "information or compilation of information used or useful... kept secret."
4) Copyright is a protection of the "expression of an idea as fixed in some tangible medium."

Each of these has differing tests and clarifications, but for the question posed, distance education incorporates both courseware (software creation), which would be a patent and possibly a trademark property, and online course material (syllabi, lectures, articles and presentations), which would be covered by copyright protection. In most cases, faculty would be adding course content, such as a syllabus, into pre-existing software packages, such as Prometheus or Blackboard. Because they are contributing course materials to software programs not created by themselves, faculty members are given the copyright for these materials, not patent rights. The typical copyright protection for these creations would be much like the protections faculty are given when writing journal articles and textbooks (Guernsey & Young, 1998).

An institution may wish to clarify how institutional policies are communicated. The American Association of University Professors (1999) found that some institutions assume ownership of all faculty created materials, although the DMCA requires specific application and transfer of such rights by signature. Most institutions do not actually obtain faculty signature, placing themselves at risk of losing intellectual property. Distance education settings will force faculty to clarify whether their publisher agreements and employment contracts determine the placement of their intellectual property rights (McIsaac & Rowe, 1997).

I am a professor and I place a considerable amount of materials on reserve at the library for my face-to-face instruction sections. In the distance setting, will I be able to rely upon distributing digital copies of copyrighted works?

The DMCA offers a new chapter (Chapter 12) to Title 17 of the U.S. Code, which stipulates that nonprofit educational institutions have the right to copy and share digital documents for purposes of archiving and preservation, in accordance with Section 108 (copying for the purposes of interlibrary loan). Such non-print works can be reproduced for the purposes of distance education, but Baird & Hallett (1999) direct faculty to the Fair Use Guidelines created by the Committee for Fair Use Guidelines for Educational Multimedia. These guidelines are:

1) "Educators and students may copy portions of copyrighted materials to be incorporated in their productions of classroom projects or classroom instruction;
2) the portion of materials should not exceed 10 percent of the total work;
3) the {section} can be utilized for educational purposes for up to two years;
4) the {section} is limited to the number of copies, namely, no more than three copies should be made--two for class use and one for preservation;
5) credit should be given to the copyright owners."

The DMCA specifically addresses "mediated instruction" and digital reserves of copyrighted works as possibly taking the market away from copyrighted works and substituting sales by providing digitally produced copies of such works. Providing full versions of the works should be cautioned against and works should be used "in a context where the instructor is illustrating a point" (Crews, 1999). Crews warns not to provide a document if unable to relate its use to learning objectives.

Conclusions

How should faculty and administration comply with the admitted complexities inherent in the copyright law? Some suggestions include:

1) Build solid and diverse relationships across academic units to assist in intellectual property discussions.
2) Develop a cross campus committee that reviews intellectual property issues and communicates guidelines.
3) Publish intellectual property policies in campus documents, on relevant parts of the campus Web site, and in other locations visible to the campus community.
4) Develop institutional expertise in intellectual property issues to foster collegiality and distribute appropriate training.
5) Assist the growth of the higher education community by supporting distance education while maintaining academic standards and complying with intellectual property laws.
6) Use guidelines, policies, and contracts to balance the interests of intellectual property creators and the institution.

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Additional Internet Resources on Copyright and Distance Education

Resources at the Distance Education Learning Center at the University of Missouri-Columbia:
http://dldc-courses.ext.missouri.edu/dldcwww/resources/copyright.htm
http://dldc-courses.ext.missouri.edu/dldcwww/resources/organizations.htm

Resources compiled by Kay E. Vandergrift, Professor, Associate Dean and Director of Distance Education at the School of Communication, Information and Library Studies at Rutgers University, New Brunswick, New Jersey:
http://www.scils.rutgers.edu/special/kay/copyrightissues.html

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